IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1025

PAUL HENRY PARKER,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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STATUTES AND CONSTITUTIONAL PROVISIONS

CITATIONS

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Paul Henry Parker, by and through his undersigned attorney, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, infra,) is reported at 585 F.2d 462. The district court did not write a formal opinion. Its order denying a Motion to Dismiss the Indictment, from which the Appeal was taken, was entered February 1, 1978.

JURISDICTION

The judgment and opinion of the court of appeals was entered on October 26, 1978. The court of appeals denied Petitioner's Motion for a Rehearing and Reconsideration on November 22, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. a) Whether, in support of a Motion to Dismiss an Indictment for reasons of double jeopardy, the Defendant need make a showing beyond a "non-frivolous" showing, in order to prevail.

b) Whether, in support of a Motion to Dismiss an Indictment for reasons of double jeopardy, the Defendant must bear the entire burden of proof, in order to prevail.

2. Whether Defendant-Petitioner made an adequate showing under either of the above-mentioned rules in the case at bar.

3. Whether the current Indictment of Defendant-Petitioner is barred for reasons of collateral estoppel.

STATUTES INVOLVED

Sections 2, 371, 842(a)(3)(A), 844(i), 1503, 1510, and 1622 of Title 18, United States Code; Section 5861 of Title 26, United States Code; Sections 439(b)(c), and 501(c) of Title 29, United States Code; and the Fifth Amendment to the United States Constitution are set forth in Appendix B.

STATEMENT

In 1975, a Federal Grand Jury sitting in Orlando, Florida, considered evidence presented to it regarding Petitioner Paul H. Parker, David W. Wingate and Ashley R. Burch, Jr. A three-count Indictment was returned against all three men. The Indictment charged each of them with violations of Title 18, U.S.C., sections 2, 371, 842, 842(a)(3)(A), 844, 844(i); Title 26, U.S.C., sections 5861, 5861(d)(e), and 5871.

Having entered their pleas of not guilty, Parker and Wingate proceeded to trial before a jury. The jury returned a verdict acquitting Wingate. Parker, however, was convicted of each

count and sentenced to concurrent terms of imprisonment of ten (10) years on Count I, ten (10) years on Count II, and five (5) years on Count III. A timely appeal of the conviction and sentence was taken to the United States Court of Appeals for the Fifth Circuit, which issued a decision affirming the trial court on December 15, 1978.

At all times material to the activities and incidents described in the 1975 Indictment (Indictment I), Petitioner Paul H. Parker was President of the Teamsters, Chauffers, Warehousemen and Helpers Union Local No. 385 at Orlando, Florida. Herman F. Witt was a business agent for the Local. David W. Wingate, Charles W. Bullard, Johnny M. Brown, Curtis Leroy Love, Kyle Duvall and Alto Oglesby were all employed in one capacity or another by the Local.

Parker, as President of the Local, and the other persons named above, were at that time engaged in an intense effort to organize and unionize several trucking companies and other business activities in the Central Florida area, particularly in Orange County, Florida.

In early 1971, one of the objects of these organizing efforts was Overland Hauling Company, located in Orange County, Florida. Count I of Indictment I charged Parker with aiding, abetting, counseling, commanding, inducing and procuring others "herein not named" to maliciously damage, by means of explosive, a building used in an activity affecting interstate commerce, located on the premises of Overland Hauling Company, Orange County, Florida, in violation of a Federal Statute.

Count II of Indictment I charged Parker with aiding, abetting, counseling, commanding, inducing and procuring others to knowingly possess a firearm, to-wit: a destructive device, in Orange County, Florida, in April of 1971, all in violation of Federal Statutes.

Count III of Indictment I charged Parker, Wingate and Burch with a "conspiracy violation." The Indictment alleged that from February 25, 1971, and continuously thereafter through April 16, 1971, in the Middle District of Florida and elsewhere, the three men conspired among themselves and with others to commit offenses against the United States "pertaining to the illicit, unlawful and malicious manufacture, transportation, transfer, possession and use of destructive devices and explosives..."

The Indictment stated the conspiracy had the following objectives: (a) to unlawfully receive and possess firearms which were not registered per Federal Statute; (b) to unlawfully transport or cause to be transported in interstate commerce, explosive materials without being a licensee or permitee under Federal Statute; (c) to unlawfully transfer a destructive device in violation of Federal law; (d) to maliciously damage and destroy, by means of an explosive bomb, buildings, motor vehicles, etc., used in interstate activities, in violation of Federal law. The Indictment stated that *"in furtherance of said conspiracy and in order to affect the objects thereof in an effort to subdue, overcome and destroy resistance to organized labor movement in Central Florida, the defendants and others committed among other overt acts, the following overt acts,"* at which point the Indictment recited twenty four (24) alleged overt acts. The acts set forth related to the procurement, assembly and use of destructive devices, the payment of money to various individuals in regard thereto, and various conversations relating thereto. The Indictment alleged that Parker participated in some of these conversations.

All of the overt acts set forth in the Indictment took place between February 25, 1971 and April 16, 1971, in and around the Orange County, Florida, area, with the exception that some of the acts took place in Miami, Florida, and some of them took place in the vicinity of Cheraw, South Carolina.

In early 1977, a Federal Grand Jury sitting in Orlando, Florida, returned yet another multi-count Indictment (Indictment II), naming Petitioner Parker and Thomas A. Larkin. Larkin was a Jacksonville, Florida, attorney who represented Parker's Local Union No. 385 in its organizing activities in the central and northeast parts of Florida.

Indictment II was in thirteen (13) counts, charging the Defendants with violating Title 18, U.S.C., sections 371, 1503, 1510, 1622, and 2; Title 29, U.S.C., sections 501(c), 439(b) and 439(c).

Count I of Indictment II charged both Parker and Larkin with a conspiracy under Title 18, U.S.C., section 371. The conspiracy was alleged to have had five (5) objectives: (1) the obstruction of communications from witnesses to special agents of the Bureau of Alcohol, Tobacco and Firearms, by intimidation, bribery, and threats of force; (2) obstruction of the due administration of justice before grand juries and the United States District Court during a series of bombing trials and grand jury investigations related thereto, specifically, *United States v. Love and Oglesby*, No. 71-33-Orl.-Cr., *United States v. Witt and Bullard*, No. 72-68-Orl.-Cr., and *United States v. Parker*, No. 76-62-Orl.-Cr.-Y; (3) subornation of perjury before grand juries in trial proceedings in the Middle District of Florida; (4) conversion and embezzlement of union monies in violation of Title 29, U.S.C., section 501(c); and (5) falsification of union records in violation of Title 29, U.S.C., section 439(c). The twelve other counts of Indictment II set forth substantially all of the overt acts alleged in support of the purported conspiracy, and alleged that those acts also constituted violations of specifically delineated Federal Statutes. Each of the defendants entered pleas of not guilty to each and every count of Indictment II.

The second Indictment alleged the purported conspiracy was in existence from February, 1971, until the date the Indictment was returned. All of the overt acts set forth in support of

the purported conspiracy, as well as the acts alleged in the twelve other counts, took place in and around Orange County, Florida.

Petitioner Parker moved to dismiss Indictment II on the grounds that the Indictment violated his constitutional right against double jeopardy, and violated the concept of "collateral estoppel." The motion was denied. After his Petition for Rehearing and Reconsideration was filed and granted, Petitioner Parker presented additional evidence not previously available to counsel for the court's consideration. Again, the relief sought in the Petition was denied.

The evidence presented to the trial court on the Motion to Dismiss included, among other things, statements given to agents of the U.S. Department of Treasury, Bureau of Alcohol, Tobacco and Firearms, which were obtained prior to the return of Indictment I and used by the Government in connection with its presentation before the first grand jury to obtain Indictment I. Transcripts of relevant portions of the statements are set forth in Appendix C. The transcripts include:

1. A statement given to the agents by Curtis Leroy Love regarding promises by Paul Parker and Herman F. Witt that if he (Love) were to be arrested, they would get him out of jail and provide him with legal counsel, and that in the event he (Love) went to prison, his family would be taken care of.

2. Testimony by Charles W. Bullard given to the Federal Grand Jury that returned Indictment I. The testimony related to promises made to Bullard of substantial sums of money from the Union, promises of legal assistance in case Bullard was arrested, payment of money for participation in a bombing, the falsification of Union expense vouchers to cover payment of the money, payment by Paul Parker of sums of money to Bullard's wife, and instructions to "stonewall it" regarding Union involvement.

3. Testimony of Herman F. Witt given as a prosecution witness in the case of *U.S.A. V. Paul Henry Parker*, 76-62-Orl.-Cr.-Y. On direct examination by the Government Witt testified regarding promises of payment of money and legal representation in case he was arrested. On cross-examination Witt testified regarding his payment of money to Curtis Leroy Love. On redirect examination by the Government, Witt testified that Parker had asked him to give false testimony at a deposition regarding involvement of Union officials in exchange for representation and help in getting out of prison if he were convicted of a crime.

4. Testimony by Herman F. Witt given before the Grand Jury that returned Indictment I. Witt testified regarding payments of money made by Parker to him in Parker's office, misuse of Union funds to pay for a trip to Miami to pick up dynamite, and falsification of Union expense vouchers to pay for dynamite purchased in South Carolina.

In further support of Petitioner Parker's claim of double jeopardy, counsel presented to the trial court excerpts from the Government's closing argument in *U.S.A. V. Parker*, 76-62-Orl.-Y. Transcripts of pertinent statements made by the Prosecutor as they relate to the charges presently pending against Petitioner are set forth in Appendix D. The statements include references to promises to persons involved in the bombings to provide legal representation and to help get them out of jail as long as they remained loyal to Parker; instructions from Parker that no one talk to him about the bombings in front of anyone else; claims that Parker had conducted, orchestrated, commanded, induced, and procured others to do the bombings and to insulate himself from any direct exposure; attempts by Parker to cover up his conduct, and to insulate himself "at every turn"; and payments to the wife of Curtis Leroy Love by Petitioner Parker.

Petitioner's counsel pointed out to the trial court that the statements referred to above and set forth in Appendices C and D refer to facts known and used by the Government in obtaining the first Indictment of Petitioner Parker and his conviction thereunder. Petitioner's counsel further contended that it was, indeed, apparent that, though the facts set forth in the statements referred to above formed the basis for the second Indictment, they formed an integral part of the conspiracy alleged in the first Indictment. Counsel argued that the Government had attempted to allege two separate conspiracies when, in fact, there was only one, and was thus placing Petitioner Parker in double jeopardy.

In its Order of February 1, 1978, the trial court stated that Petitioner Parker had not made it appear by a non-frivolous showing that the charge contained in the Indictment in this case (Indictment II) is the same as the charge contained in the first Indictment. The court therefore concluded the case at bar is not subject to being dismissed based upon either the constitutional claim of double jeopardy, or "collateral estoppel." The court made its conclusions despite the fact that the Government presented no evidence showing a distinction between the two indictments.

The Petitioner filed a timely Notice of Appeal of the lower court's Order denying his Motion to Dismiss, pursuant to 28 U.S.C. section 1291. Petitioner asserted to the court that under the cases of *United States v. Inmon*, 568 F.2d 326 (3rd Cir. 1977), and *United States v. Mallah*, 503 F.2d 971 (2nd Cir. 1974), he had made a sufficient showing of double jeopardy to the court below to require the Government to bear the burden of establishing separate conspiracies. Petitioner further contended that the Indictment must fail under the collateral estoppel doctrine of *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970).

The Court of Appeals rendered its decision October 26, 1978, affirming the decision of the trial court. (App. A) The court expressly abstained from adopting or approving the "burden shifting rule" and pointed out that the traditional rule in the Fifth Circuit is that the defendant "has the burden of proving double jeopardy." Further, the court rejected Petitioner's collateral estoppel argument, asserting that the collateral estoppel doctrine applies only when the defendant has prevailed in the prior proceeding.

The Petitioner filed a Petition for Rehearing and Reconsideration, which the court denied on November 22, 1978.

REASONS FOR GRANTING THE WRIT

The Fifth Amendment to the Constitution of the United States guarantees, in part: "...nor shall any person subject for the same offense to be twice put in jeopardy of life or limb;..." That passage has been the subject of numerous opinions by this and other courts in attempts to describe its effect upon prosecutors' abilities to repeatedly try persons for the same offense or criminal episode. Nevertheless, increasing complexities of our society have continued to raise doubts about the meaning of the guarantee against double jeopardy, as the well as the proper means of implementing it. For example, the increased interest shown by investigative agencies in "white collar" crime has given rise to numerous disputes over the question of where one criminal episode ends and another begins.

The case at bar presents a similar question with regard to conspiracies. Specifically, this case manifests what could be described as general confusion in three major areas. The first is the question of how the protection against double jeopardy should be implemented. Having made the double jeopardy claim, must the defendant then prove it (and thereby possibly jeopardize other constitutional rights)? Or is it encumbent upon the Government to then come forward and show that it has the

right to prosecute the defendant for the questioned charge? As will be discussed below, the Court of Appeals for the Fifth Circuit maintains the former; at least two circuits maintain the latter.

The second general question posed by this case is how much of a showing is required of the defendant under either procedure. Indeed, inherent in this question is a consideration of the meaning of double jeopardy itself. For this underlying consideration would determine the nature and extent of either a showing by the defendant in support of his double jeopardy claim, or a showing by the Government in support of its right to prosecute.

The third major area of consideration presented by this case involves the limitations imposed by the Fifth Amendment, and its subsidiary doctrine of collateral estoppel, upon the prosecutor's discretion to fractionize single criminal episodes into separate indictments and thereby define, himself, a defendant's rights under the Double Jeopardy Clause of the Fifth Amendment.

1. As the court below pointed out in footnote 2 of its opinion, the traditional rule in the Fifth Circuit is that the burden of proving a double jeopardy claim rests upon the defendant. *Rothaus v. United States*, 319 F.2d 528 (5th Cir. 1963); *Reid v. United States*, 177 F.2d 743 (5th Cir. 1949). The Courts of Appeals for the Second and Third Circuits, however, have taken a more progressive stance. In those Circuits, the burden of proof shifts to the Government once the defendant makes a non-frivolous showing that the charge at hand places him in double jeopardy. For reasons set forth by those courts, themselves, and alluded to below, Petitioner asserts that this "burden shifting" rule is to be preferred.

The idea that the burden of proof to defeat a double jeopardy claim should shift to the Government was first offered

by the Second Circuit Court of Appeals in *United States v. Mallah*, 503 F.2d 971 (2nd Cir. 1974). There, in raising the double jeopardy issue, the defendant claimed the prosecution was charging him for two separate conspiracies when in fact there was only one. The defendant pointed out that the two alleged conspiracies occurred in the same general location, at the same general time, and involved some of the same co-conspirators. The court stated: "We think that these facts are sufficient to satisfy Appellant's burden of going forward, of putting his double jeopardy rights at issue. At this point, the burden shifts to the Government to rebut the presumption [that the Government was trying him twice for the same conspiracy]." 503 F.2d 971, 986.

The rule was adopted and expounded in greater detail by the Third Circuit in another conspiracy case, *United States v. Inmon*, 568 F.2d 326 (3rd Cir. 1977). Again, the issue was whether the Government was properly charging two conspiracies or simply fractionizing a single conspiracy. The court noted that, though it appeared well-settled that the defendant bears the burden of raising the double jeopardy issue, there was a dearth of authority as to the burden of proof once the issue was presented. The court noted that the only Circuit Court opinions it could find dealing with the burden of persuasion in such cases were *Reid v. United States*, 177 F.2d 743 (5th Cir. 1949), and *United States v. O'Dell*, 462 F.2d 224 (6th Cir. 1972), and that neither case offered any analysis or reason for holding that the defendant bears the burden of proving the unitary nature of the charges. "Moreover, neither considered the interaction between Fifth Amendment double jeopardy and self-incrimination privileges . . ." 568 F.2d 326, 331.

"We conclude, as did the Second Circuit in *Mallah*, that, when a defendant makes a non-frivolous showing that an indictment charges the same offense as that for which he was formerly placed in jeopardy, the burden of establishing separate crimes - in this case separate conspiracies - is on the Govern-

ment. Besides the practical considerations respecting access to proof, to which we referred earlier, we also point to the obvious fact that it is the Government which has control over the drafting of indictments. Any burden imposed by the imprecision in the description of separate offenses should be born by it. To the extend that the *Reid* and *O'Dell* opinions suggest otherwise, we decline to follow them." 568 F.2d 326, 331, 332.

The court went on to address the level of proof required of the Government:

> "As to the evidentiary burden, since the Fifth Amendment double jeopardy privilege is just that - a personal and waivable privilege - rather than an element of the crime, we think it inappropriate to require the Government to prove the separateness of the offenses beyond a reasonable doubt. It is possible to argue that, since we are dealing with a significant constitutional right and since the indictment process is controlled by the Government, we should hold the Government to a standard higher than a preponderance, perhaps to prove by clear and convincing evidence. But such a standard is not constitutionally required. Cf. *Lego v. Twomey*, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972) (voluntariness of confession may be determined by preponderance of the evidence). Therefore, we hold that, when a defendant has made a non-frivolous showing that a second indictment is for the same offense for which he was formerly in jeopardy, the Government must prove by a preponderance of the evidence that there were in fact separate offenses before the defendant may be subjected to trial." 568 F.2d 326, 332.

As the court pointed out, the double jeopardy privilege is a personal and waivable privilege, rather than an element of the crime. This does not, however, diminish the prominence of the double jeopardy prohibition as an integral element in our society's concept of individual rights and freedoms. With this in mind, the practical considerations cited by the *Inmon* Court take on added importance. The prohibition against double jeopardy is not a qualified one; the Fifth Amendment is an

absolute bar against placing a citizen in jeopardy twice for the same offense. There are of course, recurring disputes over the definition of "double jeopardy." [See *United States v. Mallah, supra; United States v. Cioffi*, 487 F.2d 492, 496-498 (2nd Cir. 1973)]. Nevertheless, definitional disputes aside, the courts have consistently and meticulously enforced the provision.

In light of the great importance universally attached to the double jeopardy prohibition, the failure by the Fifth and other Circuits to offer any justification for thrusting the burden of proving double jeopardy upon the defendant is puzzling. As the *Inmon* Court pointed out, practicality and fairness demand the opposite result. Certainly, the prosecutor exercises great latitude and discretion in presenting evidence to a grand jury and seeking indictments from it. One of the few, but important, checks upon this prosecutorial discretion is the Fifth Amendment prohibition against double jeopardy. Just as the prosecutor must convince a grand jury that there is probable cause to believe a person committed a crime, the reasoning of the *Inmon* Court dictates he should have to convince the trial court he is not placing that person in double jeopardy, once the issue is properly raised. If, indeed, the double jeopardy claim is specious, that burden should be easily met. The *Inmon* Court would require the Government to rebut the presumption of double jeopardy only by a preponderance of the evidence. Certainly, much of this evidence would be the same as that the prosecutor would present to the jury, where it would have to withstand the more rigorous test of reasonable doubt. Additionally, the defendant is in a much inferior position regarding access to evidence. If the defendant can at least raise a serious question as to double jeopardy, the party most able to present the court with useful dispositive evidence in that regard is the Government.

It is also useful to note that *Mallah, Inmon*, and the case at bar are strikingly similar in that all three involve purported multiple conspiracies that overlap in time, location, and partici-

pants. Clearly, the court below in the case at bar had an excellent opportunity to reject or embrace the rule established in the Second and Third Circuits. Yet, the court expressly refused to do so. Again, the Fifth Circuit eschewed offering any analysis or reason for requiring the defendant to bear the burden of proof other than that that was the "traditional rule." Thus the court below juxtaposed what at least two circuits consider an important procedural safeguard against the Fifth Circuit's own "tradition," and failed to choose either.

Petitioner submits that such cavalier treatment hardly befits a constitutional guarantee of such import as the Double Jeopardy Clause of the Fifth Amendment.

2. The implication of the Court of Appeals' decision is that the Petitioner had to *prove* his claim of double jeopardy. The court measured the evidence offered the trial court by the Petitioner against the traditional test for determining whether double jeopardy exists formulated by this Court in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932):

> "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." 284 U.S. at 304, 52 S.Ct. at 182.

The court below then pointed out that the Fifth Circuit has interpreted the so-called "different evidence" test to require only that the second charge require proof of a fact and an element that the first charge does not. *United States v. Horsley*, 519 F.2d 1264 (5th Cir. 1975); *United States v. Hill*, 500 F.2d 733 (5th Cir. 1974). Again, the Fifth Circuit differs in this respect from at least two other circuits. For while the Fifth Circuit clings tenaciously to a restrictive view of the important personal protection against double jeopardy, other circuits have taken a more

progressive view. The Second Circuit Court of Appeals recognized the difficulty in applying the harsh "same evidence" test in *Mallah, supra*, stating in footnote 7 of its opinion:

> "7. We recognize that in recent years the "same offense" has "been subject to serious criticism," see *United States v. Cioffi*, 47 F.2d 492, 496-498 (2nd Cir. 1973), with some favoring a looser "policy of fairness" standard which would require the Government to try to gather all offenses arising out of a single transaction or scheme and bar successive prosecutions of such offenses on grounds of double jeopardy, even though the evidence required to support a conviction for one offense might differ in some respects from that supporting another." 503 F.2d 971, 985 (citations omitted).

The court went on to discuss the difficulty in applying the test.

> "The same evidence test is difficult to apply in determining whether one criminal conspiracy is the same as the second criminal conspiracy. The essence of the charge is the criminal agreement to merchandise narcotics. The same agreement may be established by different aggregations of proof. Appellant is hard pressed to show that he could have been convicted under the indictment below on the basis of the evidence introduced in *Pacelli I*, when the overt acts specified in *Pacelli I* were distinct from the overt acts charged below. But because there are no doubt many overt acts which the Government might have charged, a test measuring only overt acts provides no protection against carving one larger conspiracy into smaller separate agreements. In part for this reason, courts have been wary of applying a strict same evidence test in the context of criminal conspiracy. *In Short v. United States*, 91 F.2d 614, 624 (4th Cir. 1937), the court rejected reliance on the overt acts alleged, stating:
>
> " 'Blanket charges of "continuing" conspiracy with named defendants and with "other persons to the grand jurors unknown" fulfill a useful purpose in the prosecution of crime, but they must not be used in such a way as to contravene constitutional guaranties. If the govern-

> ment sees fit to send an indictment in this general form charging a continuing conspiracy for a period of time, it must do so with the understanding that upon conviction or acquittal further prosecution of that conspiracy during the period charged is barred, and that this result cannot be avoided by charging the conspiracy to have been formed in another district where overt acts in furtherance of it were committed, *or by charging different overt acts as having been committed in furtherance of it, or by charging additional objects or the violation of additional statutes as within its purview, if in fact the second indictment involves substantially the same conspiracy as the first... The constitutional provision against double jeopardy is a matter of substance and may not be thus nullified by the mere forms of criminal pleading.'* "

See also, *United States v. Cohen*, 197 F.2d 26 (3d Cir. 1952); *Arnold v. United States*, 336 F.2d 347 (9th Cir. 1964), cert. denied, 380 U.S. 982, 85 S.Ct. 1348, 14 L.Ed.2d 275 (1965); *United States v. Palermo*, 410 F.2d 468 (7th Cir. 1969)." *United States v. Mallah*, 503 F.2d 971, 985 (2d Cir. 1974) (emphasis added).

The application of the *Mallah* passage to the case at bar is striking. In it, the Second Court of Appeals gives recognition to a fact of life the Fifth Circuit apparently refuses to consider: under the strict same evidence test, the Double Jeopardy Clause is highly vulnerable to the prosecutor's ability to employ legal and technical niceties in carving a single conspiracy or criminal episode into many, and harassing a defendant by trying him on each.

The Fifth Circuit's mechanical application of the "same evidence" test in the case at bar flies in the face of the post-*Blockburger* holding of this Court in *Braverman v. United States*, 317 U.S. 49, 63 S.Ct. 99, 87 L.Ed. 23 (1942):

> "For when a single agreement to commit one or more substantive crimes is evidenced by an overt act, as the statute

> requires, the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects. Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. *The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one.*" 317 U.S. 99, 101-102 (1942) (emphasis added).

Again, the application of that holding to the case at bar could not be clearer. Yet, the Court of Appeals confidently dismissed the importance of *Braverman* because, as stated in Footnote 3 of the court's opinion, "since the defendant was charged with participation in two distinct conspiracies, rather than in a single conspiracy with several illegal ends, the result reached here is not affected by the rule of *Braverman v. United States.*" Incredibly, the court seems to believe that if the government charges two conspiracies, then there *were* two conspiracies, and the ruling of this court in *Braverman* therefore means nothing. Petitioner submits that if this is indeed the law, prosecutors have been granted unbridled discretion to ignore facts and to view the Double Jeopardy Clause as a mere suggestion for the exercise of that discretion.

The facts, presented in Petitioner's evidence to the trial court and uncontraverted by the Government, are that the two purported conspiracies took place at the same time, in the same general location, and involved common participants. Further, the government knew of this so-called second conspiracy well in advance of the first indictment, presented evidence of it to the first grand jury, and resorted to evidence of it to obtain Petitioner Parker's conviction under the first indictment. The fact is that the conspiracy and underlying crimes charged in the second indictment were integral parts of the conspiracy and crimes charged under the first indictment. The fact is that there was only one conspiracy, albeit with several objectives.

All of this was shown by evidence presented to the trial court in support of Petitioner's Motion to Dismiss. Clearly, Petitioner proved his double jeopardy contention under the test set forth in *Blockburger*, as interpreted in *Braverman, supra*. Further, the evidence offered by Petitioner would certainly have satisfied his responsibility of making a non-frivolous showing sufficient to shift the burden of disproving double jeopardy to the Government.

By ignoring the holding of *Braverman, supra*, and refusing to recognize the evidentiary rule espoused by the Second and Third Circuits in *Mallah* and *Inmon, supra*, the Fifth Circuit Court of Appeals has placed itself at odds with this court, its sister circuit courts, and the Fifth Amendment to the Constitution of the United States.

3. In support of its application of the Blockburger test for determining the existence of double jeopardy, the Court of Appeals below cited several cases it contended "reaffirmed the vitality" of the test. The first such case cited by the court was *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977). It is important to note, however, that *Brown v. Ohio* involved the application of the *Blockburger* test to the relationship between a lesser included offense and a greater offense. At the same time, this court recognized that other situations may call for other tests. Specifically, this Court stated in footnote 6 of the *Brown* opinion:

> "6. The Blockburger test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense. Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first. Thus in *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed2d 469 (1970), where an acquittal on a charge of robbing one of several participants in a poker game established that the accused was not present at the robbery, the

> court held that principles of collateral estoppel embodied in the Double Jeopardy Clause barred prosecutions of the accused for robbing the other victims. And in *In re Nielsen*, 131 U.S. 176, 9 S.Ct. 672, 33 L.Ed. 118 (1889), the court held that a conviction of a Mormon on a charge if cohabiting with his two wives over a two-and-one-half year period barred a subsequent prosecution for adultery with one of them on the day following the end of that period.
>
> In both cases, strict application of the Blockburger test would have permitted imposition of consecutive sentences had the charges been consolidated in a single proceeding. In *Ashe*, separate convictions of the roberry of each victim would have required proof in each case that a different individual had been robbed. See *Ebeling v. Morgan*, 237 U.S. 625, 35 S.Ct. 710, 59 L.Ed. 1151 (1915). In *Nielsen*, conviction for adultery required proof that the defendant had sexual intercourse with one woman while married to another, conviction for cohabitation required proof that the defendant lived with more than one woman at the same time. Nonetheless, the court in both cases held the separate offenses to be the "same" for purposes of protecting the accused from having to " 'run the gantlet' a second time." 97 S.Ct. 2221, 2226 (1977) (citations omitted).

Two important points may be gleaned from that passage. First, the application of the collateral estoppel doctrine to criminal cases substantially pre-dates this Court's holding in *Ashe v. Swenson*. Indeed, the primary significance of *Ashe* is that it for the first time perceived the collateral estoppel doctrine as an essential ingredient of the Fifth Amendment guarantee against double jeopardy. See the concurring and dissenting opinions to *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970) It cannot be maintained, therefore, that *Ashe* confines the scope of the collateral estoppel doctrine to the facts of that particular case. Yet, the Fifth Circuit would apparently interpret *Ashe* as holding the collateral estoppel doctrine applies only where the defendant has prevailed in the previous proceeding, as was the case in *Ashe*. Such is the implication of the Court of Appeals' statement that *Ashe* "is inapposite here, since

none of the factual issues involved in the second indictment was necessarily found for the defendant in the first trial, as defendant was convicted on all counts." (citation omitted).

This misstatement of the law calls forth the second major point arising from footnote 6 of the *Brown* opinion. Collateral estoppel, indeed, does not apply only where the defendant prevailed in the previous proceeding. As explained by this court in footnote 6 of its *Brown* opinion, the case of *In re Nielsen* involved a second trial on another charge *after the defendant had been convicted at the first trial.* Although the offenses charged would not have implicated the Double Jeopardy Clause under the *Blockburger* test, the court nonetheless held the offenses were the same in order to prevent the accused from having to "run the gantlet" a second time.

The reason behind the Court's decision in that case clearly indicates a strong constitutional policy basis for the collateral estoppel doctrine, in that prosecutors are to be discouraged from continually hauling a defendant into court on technically separate crimes and harassing him with evidence of the same criminal incident. The Fifth Circuit Court of Appeals would apparently provide this protection only to previously successful defendants, leaving the losers to fend for themselves.

The case at bar is an excellent example. Here, the Petitioner has shown by uncontraverted evidence presented to the trial court that there was a single conspiracy to commit bombings in furtherance of union organizing activities. Part of the plan, as set forth by the first indictment, was to recruit persons to do the bombings and to offer them inducements for their participation. These inducements included promises of cash payments, legal representation in case of arrest, support of the participants' families in case of conviction, and help in getting the participants out of prison in case of conviction. In exchange, those recruited were to perform the bombings and to deny, and otherwise cover up, any involvement by the union or its president,

Petitioner Paul H. Parker. Evidence available to the government, and used by the prosecutor to obtain the first indictment and first conviction, established that the plan called for union funds to finance the bombing conspiracy, and that a "cover up" was part of the original plan.

Clearly, what the government contends was the "first" conspiracy could not have proceeded without the "second." Conversely, without the "first" conspiracy, there was no purpose for the "second." There was, in fact, only one conspiracy. Yet the government has chosen to divide the single conspiracy into two, thereby allowing it to present its evidence of the conspiracy to the jury twice.

The fact that the charges in the two indictments may be technically different, and would therefore pass muster under the *Blockburger* test, is not dispositive of the propriety of the government's conduct. As this court noted in *Brown v. Ohio, supra,* the *Blockburger* test is insufficient to protect the defendant's rights under the Fifth Amendment Double Jeopardy Clause in every situation. Petitioner submits that the case at bar is just such a situation. The government, fully aware that the acts charged in the second indictment were integral parts of the crimes charged in the first indictment, and indeed having presented evidence of the crimes charged in the second indictment to the jurors in order to convict the Petitioner in his first trial, should be estopped from bringing Petitioner to trial on the current charges.

CONCLUSION

As previously set forth in this Petition, Petitioner respectfully submits that the decision and opinion of the Court of Appeals in this case raises important questions regarding the rights of defendants under the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. Petitioner therefore respectfully urges this Court to issue a Writ of Certiorari to the Circuit Court of Appeals for the Fifth Circuit so these issues may be more fully examined through briefs and argument, and so they may receive the benefit of this Court's judgment and final resolution.

Respectfully submitted,
LEVINE, FREEDMAN, HIRSCH
& LEVINSON
Professional Association

By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari has been furnished, by mail, to Mark L. Horowitz, Assistant United States Attorney, for the Middle District of Florida, P.O. Box 2593, Orlando, Florida, 32802; Wade McCree, Jr., Solicitor General of the United States of America, Department of Justice, Washington, D.C.; and Edward W. Wadsworth, Clerk of the United States Court of Appeals for the Fifth Circuit, 600 Camp Street, New Orleans, Louisiana, 70130, this _____ day of December, 1978.

_____
ATTORNEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1025

PAUL HENRY PARKER,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDICES TO PETITION

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APPENDICES TO PETITION

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APPENDIX A

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
PAUL HENRY PARKER,
Defendant-Appellant.

Nos. 78-1269, 78-1270
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Oct. 26, 1978.

Defendant appealed from an order of the United States District Court for the Middle District of Florida, John A. Reed, Jr., J., denying his motion to dismiss an indictment. The Court of Appeals, Ainsworth, Circuit Judge, held that: (1) the indictment, which charged a wide-ranging conspiracy affirmatively and unlawfully to interfere with the processes of justice, did not place defendant in double jeopardy; (2) the fact that evidence of the offenses charged in the indictment was admitted at an earlier trial of defendant on the charge that he participated in a distinct bombing conspiracy did not, by itself, implicate the double jeopardy clause, and (3) the collateral estoppel doctrine was inapposite.

Affirmed.

1. Indictment and Information 1023(8)

Denial of motion to dismiss indictment on double jeopardy grounds is an appealable "collateral order."

See publication Words and Phrases for other judicial constructions and definitions.

2. Criminal Law 202(1)

Indictment of defendant for a wide-ranging conspiracy affirmatively and unlawfully to interfere with the processes of justice did not place him in double jeopardy where, although defendant had previously been convicted of participation in a

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*Rule 18, 5 Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

conspiracy to induce bombing and there was some overlap in the time during which the alleged conspiracies existed and in the participants in the conspiraces, different overt acts were charged and the underlying objectives of the conspiracies were distinct. 18 U.S.C.A. §§ 371, 842(a)(3)(A), 844(i), 1503, 1510, 1622; 26 U.S.C.A. (I.R.C.1954) § 5861; Labor-Management Reporting and Disclosure Act of 1959, §§ 209(b, c), 501(c), 29 U.S.C.A. §§ 439(b, c), 501(c).

3. Criminal Law 202(1)

Fact that evidence of offenses underlying indictment charging a conspiracy to interfere with the processes of justice had been admitted at prior trial of defendant on charge of conspiring to induce bombing did not, by itself, implicate the double jeopardy clause where the offenses charged in the later indictment for obstruction of justice were not charged in the earlier indictment.

4. Judgment 751

Where none of the factual issues involved in indictment charging defendant and a codefendant with a wide-ranging conspiracy affirmatively and unlawfully to interfere with the processes of justice was necessarily found for defendant at prior trial on charge that he induced others to maliciously damage a building by explosives and to unlawfully possess destructive devices and that he conspired to violate the statute pertaining to the unlawful transportation of explosives, the collateral estoppel doctrine was inapposite to prevent trial of defendant on obstruction of justice charges. 18 U.S.C.A. §§ 371, 842(a)(3)(A), 844(i); 26 U.S.C.A. (I.R.C.1954) § 5861.

Appeals from the United States District Court for the Middle District of Florida.

Before GOLDBERG, AINSWORTH and HILL, Circuit Judges.

AINSWORTH, Circuit Judge:

[1] Defendant Paul Henry Parker appeals from the district court's denial of his motion to dismiss the indictment (hereinafter described) on the grounds that trial thereof would place him in double jeopardy and that the Government is collaterally estopped from prosecuting him on the offenses charged in the

indictment. We agree with the district court, and therefore affirm the denial of the motion to dismiss the indictment.[1]

Parker was president of a Teamsters Local involved in an organizational struggle that he was marred by a series of bombing incidents in 1971. He was charged and convicted of unlawful involvement in these bombings. The specific counts were: (1) inducing others to maliciously damage a building by explosive (18 U.S.C. § 844(i)); (2) inducing others to unlawfully possess destructive devices (26 U.S.C. § 5861); (3) conspiring (18 U.S.C. § 371) to violate 18 U.S.C. § 844(i), 26 U.S.C. § 5861 and 18 U.S.C. § 842(a)(3)(A) (unlawful transportation of explosives).

Count One of the current indictment charges Parker and a codefendant, Thomas A. Larkin, with a conspiracy (18 U.S.C. § 371). The Government alleges that this conspiracy has five objectives: obstruction of criminal investigations (18 U.S.C. § 1510), obstruction of justice (18 U.S.C. § 1503), subornation of perjury (18 U.S.C. § 1622), embezzlement of union funds (29 U.S.C. § 501(c)) and the falsification of union records (29 U.S.C. § 439(b) & (c)). The remaining twelve counts charge specific acts of embezzlement and falsification of union records and reports. The conspiracy was charged to have begun in February 1971 and to have continued until the date of the indictment, October 27, 1977. This is contrasted with the conspiracy in the first indictment, which began on February 25, 1971, and ended by April 16, 1971, according to the indictment. Parker and two other defendants, Wingate and Burch, were the indictees in the first indictment, whereas Parker and Larkin were the indicted coconspirators in the second.

Defendant contends that the current indictment places him in double jeopardy. The Government asserts, on the other hand, that the offenses charged in this indictment all concern unlawful efforts to conceal criminal responsibility for the bombings rather than the offenses concerning the bombings themselves, and therefore that no double jeopardy problem is involved.

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1. A denial of the motion to dismiss on double jeopardy grounds is an appealable "collateral order" under *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). *See United States v. Smith*, 5 Cir. 1978, 574 F.2d 308, 309.

Defendant relies on *United States v. Inmon*, 3 Cir., 1977, 568 F.2d 326 and *United States v. Mallah*, 2 Cir., 1974, 503 F.2d 971, 985-87, *cert. denied*, 420 U.S. 995, 95 S.Ct. 1425, 43 L.Ed.2d 671 (1975), in contending that his double jeopardy claim should prevail. The *Inmon* court adopted the Second Circuit's rule in *Mallah*, and held that "when a defendant makes a nonfrivolous showing that an indictment charges the same offense as that for which he was formerly placed in jeopardy, the burden of establishing separate [conspiracies]. . . is on the government." 568 F.2d at 331-32. However, the district court in this case explicitly found that defendant had not made such a "non-frivolous showing." Without adopting or approving this burden-shifting rule,[2] we conclude that the district court was correct in rejecting defendant's double jeopardy claim.

The traditional test for determining whether prosecution on a second charge violates the double jeopardy clause was formulated by the Supreme Court in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." 284 U.S. at 304, 52 S.Ct. at 182. Recent Supreme Court decisions have reaffirmed the vitality of this test. *See Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); *Jeffers v. United States*, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977); *Ianelli v. United States*, 420 U.S. 770, 785 n. 17, 95 S.Ct. 1284, 1294, 43 L.Ed.2d 616 (1975). This Circuit has interpreted this "different evidence" test to mandate only that the second charged offense require

2. The traditional rule in this Circuit is that the defendant has the burden of proving double jeopardy. *See Rothaus v. United States*, 5 Cir., 1963, 319 F.2d 528, 529; *Reid v. United States*, 5 Cir., 1949, 177 F.2d 743, 745. *But see United States v. Inmon*, 3 Cir., 1977, 568 F.2d 326, 331 (distinguishing *Reid* mainly on the grounds that there was a full evidentiary record of the first trial, the placement of the burden of persuasion was not of critical importance, and that *Reid* was decided before *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977) made it clear that a pretrial evidentiary hearing was appropriate. There is, of course, a full evidentiary record of the first trial in this case. *Rothaus* was distinguished as involving the defendant's burden of demonstrating an abuse of discretion in the district court's declaration of a mistrial in defendant's first trial.)

proof of a fact and an element that the first charged offense does not. *United States v. Horsley*, 5 Cir., 1975, 519 F.2d 1264, 1265; *United States v. Hill*, 5 Cir., 1974, 500 F.2d 733, 740.

[2] It is apparent that the "different evidence" standard is amply satisfied in the present case. The defendant was charged with involvement in two separate and distinct conspiracies; the first concerned the inducement of bombing, while the second involves the obstruction of justice. Although there is some overlap in the time the conspiracies are charged to have existed, and in the participants in these conspiracies, the overlap is not significant for double jeopardy purposes. Different overt acts are charged, and the underlying objectives are distinct. The second indictment charged a wide-ranging scheme affirmatively and unlawfully to interfere with the processes of justice, rather than a simple continuation of the bombings conspiracy.[3]

[3, 4] The fact that evidence of the offenses charged in the current indictment was admitted at the earlier trial does not, by itself, implicate the double jeopardy clause, as those offenses were not charged in the first indictment. *See Sanchez v. United States*, 9 Cir., 1965, 341 F.2d 225, 227, *cert. denied*, 382 U.S. 856, 86 S.Ct. 109, 15 L.Ed.2d 94 (1965) (where evidence of the marijuana transaction currently charged had been admitted in a previous trial to rebut a defense of entrapment). The collateral estoppel doctrine of *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970) is inapposite here, since none of the factual issues involved in the second indictment was necessarily found for the defendant in the first trial, as defendant was convicted on all counts. *See Hardwick v. Doolittle*, 5 Cir., 1977, 558 F.2d 292, 298, *cert. denied*, 434 U.S. 1049, 98 S.Ct. 897, 54 L.Ed.2d 801 (1978).

AFFIRMED.

3. Since the defendant was charged with participation in two distinct conspiracies, rather than in a single conspiracy with several illegal ends, the result reached here is not affected by the rule of *Braverman v. United States*, 317 U.S. 49, 63 S.Ct. 99, 87 L.Ed. 23 (1942).

APPENDIX B

18 U.S.C.
§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C.
§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 842(a)(3)(A).
(3) other than a licensee or permittee knowingly—

(A) to transport, ship, cause to be transported, or receive in interstate or foreign commerce any explosive materials, except that a person who lawfully purchases explosive materials from a licensee in a State contiguous to the State in which the purchaser resides may ship, transport, or cause to be transported such explosive materials to the State in which he resides and may receive such explosive materials in the State in which he resides, if such transportation, shipment, or receipt is permitted by the law of the State in which he resides; or

18 U.S.C. 844(i)

(i) Whoever maliciously damages or destroys, or attempts to damage or destroy by means of an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten

years or fined not more than $10,000, or both; and if personal injury results shall be imprisoned for not more than twenty years or fined not more than $20,000, or both; and if death results shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment as provided in section 34 of this title.

18 U.S.C.
§ 1502. **Resistance to extradition agent**

Whoever knowingly and willfully obstructs, resists, or opposes an extradition agent of the United States in the execution of his duties, shall be fined not more than $300 or imprisoned not more than one year, or both. June 25, 1948, c. 645, 62 Stat. 769.

18 U.S.C.
§ 1503. **Influencing or injuring officer, juror or witness generally**

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 769.

18 U.S.C.
§ 1510. **Obstruction of criminal investigations**

(a) Whoever willfully endeavors by means of bribery, misrepresentation, intimidation, or force or threats thereof to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator; or

Whoever injures any person in his person or property on account of the giving by such person or by any other person of any such information to any criminal investigator—

Shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(b) As used in this section, the term "criminal investigator" means any individual duly authorized by a department, agency, or armed force of the United States to conduct or engage in investigations of or prosecutions for violations of the criminal laws of the United States.

18 U.S.C.
§ 1622. **Subornation of perjury**

Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than $2,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 774.

26 U.S.C.
§ 5855. **Unlawful transportation in interstate commerce**

It shall be unlawful for any person who is required to register as provided in section 5841 and who shall not have so registered, or any other person who has not in his possession a stamp-affixed order as provided in section 5814 or a stamp-affixed declaration as provided in section 5821, to ship, carry, or deliver any firearm in interstate commerce.

26 U.S.C.
§ 5861. **Penalties**

Any person who violates or fails to comply with any of the requirements of this chapter shall, upon conviction, be fined

not more than $2,000, or be imprisoned for not more than 5 years, or both, in the discretion of the court. Aug. 16, 1954, c. 736, 68A Stat. 729.

29 U.S.C.
§ 438. Rules and regulations; simplified reports

The Secretary shall have authority to issue, amend, and rescind rules and regulations prescribing the form and publication of reports required to be filed under this subchapter and such other reasonable rules and regulations (including rules prescribing reports concerning trusts in which a labor organization is interested) as he may find necessary to prevent the circumvention or evasion of such reporting requirements. In exercising his power under this section the Secretary shall prescribe by general rule simplified reports for labor organizations or employers for whom he finds that by virtue of their size a detailed report would be unduly burdensome, but the Secretary may revoke such provision for simplified forms of any labor organization or employer if he determines, after such investigation as he deems proper and due notice and opportunity for a hearing, that the purposes of this section would be served thereby.

29 U.S.C.
§ 439. Violations and penalties

(a) Any person who willfully violates this subchapter shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(b) Any person who makes a false statement or representation of a material fact, knowing it to be false, or who knowingly fails to disclose a material fact, in any document, report, or other information required under the provisions of this subchapter shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(c) Any person who willfully makes a false entry in or willfully conceals, withholds, or destroys any books, records, reports, or statements required to be kept by any provision of this subchapter shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(d) Each individual required to sign reports under sections 431 and 433 of this title shall be personally responsible for the filing of such reports and for any statement contained therein which he knows to be false.

29 U.S.C.
§ 501. Embezzlement of assets; penalty

(c) Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX C

The following are relevant portions of the statement given by Curtis Leroy Love to the agents:

Agent: Did Witt ever . . . you, if and when you got arrested or busted or anything . . . some of this stuff he wanted you to do? That, uh, they'd take care of your family?

(Inaudible response)

Agent: What did he say along that line?

Love: Paul Parker told me.

Agent: Do you recall what . . .

Love: No, I don't. But if we got in any trouble concerning the picket line and stuff like this, that they would — in other words, I guess he meant if we got in a tight or anything with some of them on the, driving the trucks, that they would get us out of jail, not to worry about it.

And Witt told me that if I got caught or got in any trouble over this bombing, not to worry about it, that he could get me out, and I'd be on the street.

And if I ever had to go to the penitentiary for anything, that my family would be taken care of while I was down there.

Agent: Said who was going to take care of 'em?

Love: He just said that they would be taken care of. I wouldn't have to worry about being — so I took the man at his word.

While testifying before the Federal Grand Jury that returned the first Indictment against Appellant (76-72), Charles W. Bullard testified to the following:

A. Yes, sir, at one point he told me there would be no less than $10,000 in it for me.

Q. $10,000 for you alone?

A. Yes, sir.

Q. What did he mean by that? Or what did he say to indicate that the Union would be behind you 100%?

A. Well, I told him about that dynamite. I said that's some pretty combustible stuff, supposing we get caught with the dynamite, that a charge within itself.

He said, "Don't worry about it, they will never shut the door on you."

Q. Did he indicate what the Union was going to do for you, or what assistance the Union was to render to you to keep the door from being shut on you?

A. Yes, sir. He said they had something set up with the Bonding outfit and that they would never shut the door on us.

* * *

A. He said we would be furnished with the best lawyers and we would be out on bond, and in the event he said, which he had never known it to happen, but in the event we did have to stay in jail our families would be taken care of.

They would draw a Destitute Fund and we would too while we were in jail.

Q. To your knowledge, none of this could come about without Paul Parker's approval, is that right?

A. That's right.

Q. As far as legal fees being paid and bonds being paid out of Union funds?

A. That is correct.

* * *

A. I believe, now if I am not mistaken, Johnny and I both got I believe either fifty or one hundred dollars apiece at that time.

* * *

Q. And in order to get that money—. Well, how was that handled? How did you get your money from Herman?

A. We had to sign something. I believe they called it a Destitute Fund slip, and then he would take it there to the Union cashier, which was Marie, I only knew her as Marie, and she would give him the money and he would give it to us.

Q. Was that called the Destitute Fund or the Hardship Fund?

A. One or the other. I am not sure.

Q. What was the purpose for your receiving that money?

A. What was the purpose?

Q. Right.

A. Why did they give me the money?

* * *

Q. Right.

A. For our part in blowing up the dredge.

Q. For your part in blowing up the dredge?

A. Yes, sir.

Q. In other words it wasn't for any hardship you were experiencing.

A. No, sir.

Q. Is that correct?

A. That is correct.

Q. How did you work this? I mean, did you submit a voucher there? Did you submit or did you sign anything, anything else, or did you submit any sort of receipt to the Union?

A. No more than just the paper Herman had me to sign. To the best of my knowledge.

* * *

Q. And it was what, $50 each?

A. It was either $50 or $100, I am not sure which it was.

* * *

Q. At this point in time, while Local 385 was on strike and you were a member of Local 385, what was your source of income?

A. What was my source of income?

Q. Right. Where was your money coming from?

A. Well, he was giving us a little along until we could get the money that he had promised me.

* * *

A. . . .on the phone from North Carolina and he told me Bud Love and Alto Oglesby had been arrested, but that Charley Sharp had went down and signed their bonds, and the bonds were something like $100,000 on each one of them, and that Charley had went down and signed their bonds. They were out on bonds.

* * *

Q. I don't know if you told us earlier, but why did you come back down to Orlando?

A. To get my money.

* * *

Q. When you say "to get your money," what money are you talking about?

A. The money Mr. Witt had promised me to start with.

Q. That was the money for what?

A. For the bombings and everything.

* * *

Q. That was a poor question, let me ask it this way. Did anyone connected with Local 385 in any way pay you any sum of money after Mr. Witt gave you the $18 in the motel room?

A. Not until after I was arrested, and then there was some paid, but not directly to me.

Q. When you say "none was paid directly to you," are you saying you were the ultimate recipient of some money, is that correct?

A. Right.

Q. Tell us who paid the money and how did it eventually end up in your hands?

A. Well, Mr. Parker gave my wife some. I don't know how much he gave her. You know, I don't recall.

Q. That is Paul Parker?

A. Yes, sir.

Q. He gave your wife some money?

A. Yes. She went to the office with a message I had give her about the $125 a week that she was supposed to get in the event I got in jail, and I believe she told me he only gave her the $75 at that time, and then I think he gave her $100 or maybe $200 at another time.

* * *

Q. But, at a previous point in time you had been promised $125 a week for her?

A. That is what my wife would get in the event I went to jail.

Q. Are you saying in the event you went to jail. Did you people set down and discuss this at some point in time, saying, "Well, this is what is going to happen if I go to jail?"

A. Well, to start with Mr. Witt told me that they wouldn't ever shut the door on me.

Q. That's right, but apparently you must have said, 'What happens if the door shuts on me?"

A. Yeah, I did, and he said, "Well, very seldom anything like that would ever happen. That would be very unusual," or something to that effect but he says, "If you did, you won't have to worry about spending money and your wife won't have to worry about living ex-

penses until you are back out again. Everything will be taken care of," and I said, "To what extent?" He said, "Well, like Bud Love's wife was getting $115 or $125 a week right now." That was before Bud started talking through to the Agents about what happened, but she never got nothing like that."

* * *

In fact, he gave her some hard words to start with, and then gave her the money.

JUROR: What was the hard words?

THE WITNESS: Like he didn't owe nobody nothing, but he give her the money.

* * *

Q. Did anyone else ever tell you, throughout this whole period, to stonewall it, so to speak? To keep your mouth shut?

A. Yes, sir.

Q. Who?

A. In the beginning Herman.

Q. Herman told you that?

A. Yes, sir. This was before Herman went to jail himself.

* * *

Q. Is it your testimony you yourself did not pay any money for legal fees?

A. No, sir, I did not pay one nickel for legal fees.

Q. And again I think I asked you this earlier, but I want to clarify it myself. Did anyone at all indicate to you that someone was paying these attorneys in your behalf?

A. Yes, sir.

Q. All right, who indicated that to you?

A. Herman told me I wouldn't have to worry. He said, like I told you in the beginning, you will get the best that can be got.

Q. So it was your understanding that Local 385 was going to pay for your representation?

A. Sir, it was my understanding that the Union was behind me 100%, from the beginning to the end.

* * *

A. Right. He was the Business Agent with the Union.

Q. When Herman Witt spoke to you, it was like speaking with 395?

A. That is the impression he gave me, and that is the way I took it.

Q. But again these attorneys' fees couldn't have been paid without Paul Parker's approval, isn't that correct?

A. To the best of my knowledge Herman Witt didn't have that kind of money, no, sir.

Q. Well, what I am saying is, if they did come out of Union Funds, they could not be paid without Paul Parker's approval.

A. That is correct, as far as I know, yes, sir. I would think that would be correct, yes, sir.

* * *

Q. Just to wrap this up then, essentially you have told us you had been represented by one, two — well, you have had several attorneys representing you down through this period of time, and you haven't paid any of them any legal fees out of your own pocket, is that correct?

A. That is correct.

Q. That is a correct statement?

A. That's right.

* * *

Q. Did you ever ask the attorneys who was paying them?

A. No, ma'am, I didn't. Ma'am, I just assumed that the Union was paying it, you know, because as I said in the beginning, they told me I would be well taken care of, and attorneys of the caliber of Norman Abood and this Ralph Sistrunk and Lou Ferris and people like that, they don't come very cheap.

Testifying as a prosecution witness in the case of *U.S.A. V. Paul Henry Parker*, 76-62-Orl-Cr-Y, Herman F. Witt stated the following on direct examination:

Q. What did you get from Mr. Parker for doing these, making these bonds and getting these bombs, these sites blown up?

A. Nothing but a bunch of promises.

Q. What were you promised?

A. Many things.

Q. Can you name some of the things that you were promised.

* * *

Q. What are some of the items that you were promised?

A. Money, representation if anything happened.

Q. Anything else?

A. These things were promised at different times and in different ways. What it amounted to me was money and representation, representation and whatnot in case anything happened.

On cross-examination, Witt testified as to the following: Strike lines 7-17):

Q. Did you actually mechanically help plant a bomb at Overland or anything of that nature?

A. You mean to be ignited?

Q. Yes.

A. No, sir.

Q. Well, you just talked to Mr. Love and that was the end of your participation; is that right?

A. Mr. Love agreed that he could and would do it for $200, was my understanding.

Q. And when it was done, did you pay Mr. Love for having done it?

* * *

A. He said that their expenses were such that he didn't have enough money with him to purchase the dynamite and have money to get back to Orlando.

Q. Did he specify a certain amount that he wanted?

A. Yes, sir.

Q. What was that?

A. Fifty Dollars.

Q. And did you send it or have it sent?

A. I guess you could say I had it sent.

On re-direct examination by the government, Witt testified as to the following:

Q. Now, at that time when you denied any knowledge, was that true?

A. Yes, sir.

Q. Did you have any knowledge of those bombings on April the 13th?

A. Yes, sir.

Q. You had knowledge of it?

A. Yes, sir.

Q. So then your testimony at that time was false?

A. Yes, sir.

Q. Excuse me, I don't understand. Was your testimony false? Your testimony was false?

A. It was false.

Q. Had you talked to anyone prior to giving your testimony about giving false testimony at that deposition?

* * *

Q. Sir, did you talk with anyone prior to giving that false testimony at that deposition about what you were going to say?

A. Yes, sir.

Q. Who?

A. Mr. Parker and I believe — well, I know there were other people. I don't remember their names, but there were other people.

* * *

Q. The conversation between you and Mr. Parker, what was said at that time?

* * *

A. That I should deny any knowledge, anything about it.

Q. This is after Parker had asked you to do these things.

* * *

Q. Were you ever promised — did anyone ever not associated with the Government ever promise to get you out of prison?

* * *

Q. Did anybody ever make any kind of statement of that nature to you?

A. Promises?

Q. To get you out, not connected with the Government?

A. Yes, sir.

Q. Do you recall who?

A. Mr. Parker.

Q. And when?

A. Many times.

* * *

Q. Was it after you were taken into custody?

A. Yes, sir.

* * *

(statement of the prosecutor)

MR. HORWITZ: The testimony has revealed that this man for a long period of time continually denied any knowledge of participation in the bombings. It is the Government's position that during this time he was being advised by Mr. Parker that he would be — that the Teamsters would take steps to get him out of jail.

* * *

Q. What did Mr. Parker say to you about getting you out of prison?

A. Mr. Parker said that I would have the best of, best attorneys that could be gotten and that — things relating to that, that I would be bonded and represented by the best attorneys that could be gotten.

Q. Did he ever say he would get you out in 30 days?

A. Yes, sir.

Prior to his being called as a government's witness, in Case 76-62-Orl-Cr-Y, Herman F. Witt had appeared before the Grand Jury on November 4, 1975, and testified as follows:

A. I was standing right in front of Mr. Parker's desk.

Q. Now, did he give you the envelope right there at this time?

A. In this very instance he put the money in the envelope and gave me the envelope to take.

Q. You saw him put money in it in front of you?

A. I don't remember seeing him put the money in it, sir. I don't remember seeing him put the money in the envelope.

* * *

Q. Okay, we will just move ahead a little bit. While you and Paul Parker were discussing and engaging in a planning of the bombings, you know, when you were getting ready to rain the dynamite down—

A. Yes, sir.

Q. You were working for the Union at that time were you not?

A. I was.

Q. And Paul Parker was too?

A. Yes, sir.

Q. And you were both collecting salaries from the Union at that time?

* * *

A. Yes, sir. I know I was and I am sure he was.

Q. And I believe in February, the latter part of February and the early part of March 1971, you testified you went down to Miami to pick up dynamite, is that correct?

A. Yes, sir.

Q. And at that time how did you pay for the expenses for the travel down to Miami and back?

A. The expenses were paid out of my pocket, but I had a receipt for the Turnpike, the Turnpike receipt. You get

a receipt when you pay coming off the Turnpike. And, as I stated this morning, I think I paid for the food that was consumed for breakfast. I would turn in that receipt and receive my money back also.

Q. Were there any lodging expenses involved?

A. No, sir. I left early that morning and drove to Miami.

Q. The travel, the gasoline?

A. That is on Credit Card.

Q. And whatever food expense you had when you were down there?

A. Yes, sir. I don't recall fueling, but all my fuel is on a Credit Card. Union Credit Card.

* * *

Q. And the fuel and the expenses you incurred going down for the dynamite, and coming back, were charged to Local 385?

A. Yes, sir.

* * *

Q. Did you turn in any specific records or travel receipts, other than the Turnpike receipt, concerning this trip?

A. That trip?

Q. Yes, sir.

A. Not that I recall. Not that I recall other than just the Turnpike receipt and if I did pay for the food, it would have been normal procedure for me to have turned in a receipt for the food consumed at the restaurant.

Q. And what would you put on such a receipt to justify it?

A. I could have put—I am sure I would have been evasive in it. There's no telling what I put on it, but it wouldn't have been to go get dynamite. I would possibly have said to pick up Contracts, or just on the Turnpike ticket, "Miami."

* * *

Q. When did you learn Mr. Bullard had come back from South Carolina with the dynamite?

A. He came to the Union office and told me that he was back, and I have him $200 that it was agreed for him to go.

* * *

Q. Did you ever seek to get back that $200?

A. Yes, sir.

Q. How did you do that?

A. I made a phony bill for a meeting. Normally it would be coffee, doughnuts and whatnot. I think I put on the bill one hundred people in Gainesville, Florida.

Q. This was a bill you submitted as if it were expenses you had incurred.

A. Yes, but I made that bill out for $208.

Q. And you did then draw that $208 from the Local 395 Treasury?

A. A check was issued to me for that, yes, sir.

Q. And that was considered to be what? Expense money and expense payment money to you?

A. Money that I had spent at this meeting.

Q. Now, when you paid Bullard the $200, did you get the dynamite at that time?

APPENDIX D

In further support of Appellant's claim of double jeopardy, counsel presented to the trial court excerpts from the Government's closing argument in *U.S.A. V. Parker*, 76-62-Orl-Y. The pertinent statements made by the prosecutor as they relate to the charges presently pending against Appellant are as follows:

"Also talked about delivering a bomb to Duvall, and also talked about being in jail, hearing a threat from Parker about Witt, how he had been promised by Parker to get out of jail as long as he remained loyal to Mr. Parker."

* * *

" 'It is my routine to say no violence,' and it was routine to say no violence. He preached it every chance he had in front of a crowd just like he told Bullard never talk to me in front of anybody else about bombings.

"We are dealing here with a conspiracy in which the head man has taken all steps possible to insulate himself from any direct exposure.

"In effect he is acting like the conductor of an orchestra. He has conducted, he has orchestrated, he has commanded, induced, procured others to do these bombings for him and he at all times attempted to do so in a secretive manner."

* * *

"Bullard said that he was told that, 'As long as you remain loyal to me you will be all right.' That is what Parker told him, promised to get him out of jail if 'You remain loyal to me.'

"He has not only conducted and orchestrated the bombings themselves but he has conducted and orchestrated the defense of Witt and Bullard — attempts to cover up his conduct, attempts to insulate himself at every turn."

* * *

"Orchestrating his defense just as he orchestrated the bombings. At all steps trying to insulate himself from the actual events, putting as much distance as he can between himself and chances of getting caught."

* * *

"There there was rebuttal, and what was put on on rebuttal? Mr. Leroy Love, Curtis Leroy Love, testified that when he was arrested, as soon as he got out of jail and was at the union hall, then, Parker told him to keep his mouth shut, and shortly before his trial or during the trial he met with Parker and Parker then told him to keep his mouth shut and his bowels open.

"Then Mrs. Love testified how shortly after her husband was arrested she got $25 a week and it started going up after that, going up from $25 a week finally I think to $115 a week after a period of time.

"That she was on welfare and she told Mr. Parker she was on welfare but the payments continued, and they continued until she appeared before the Grand Jury and was granted immunity and that is when they continued to."

* * *

"His reliance on the bombings, his attempts to orchestrate this event and to cover himself from being detected started from the very beginning when he told Charles Bullard, 'Don't talk to me about this in front of anybody else.' "

No. 78-1025

In the Supreme Court of the United States

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 582 F. 2d 953.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1978. A petition for rehearing was denied on November 22, 1978. The petition for a writ of certiorari was filed on December 22, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the conspiracy count of petitioner's indictment should have been dismissed on grounds of double jeopardy.

STATEMENT

Petitioner was the president of Teamsters Union Local No. 385, which was involved in an organizational struggle marred by a series of bombing incidents in 1971 in Orange and Lake Counties, Florida. Petitioner was charged with and convicted of unlawful involvement in these bombings, and his conviction was affirmed on appeal. *United States* v. *Parker,* 586 F. 2d 422 (5th Cir. 1978). The specific counts were: (1) inducing others maliciously to damage a building by explosive (18 U.S.C. 844(i)); (2) inducing others unlawfully to possess destructive devices (26 U.S.C. 5861); and (3) conspiracy (18 U.S.C. 371) to violate 18 U.S.C. 844(i), 26 U.S.C. 5861 and 18 U.S.C. 842(a)(3)(A) (unlawful transportation of explosives) (Pet. App. A–3; Pet. 4).

In 1977, a federal grand jury sitting in Orlando, Florida, returned another multi-count indictment charging petitioner and Thomas Larkin, the Teamster Local's attorney, with a conspiracy to cover up the involvement of petitioner and other union officials in the bombing campaign. The indictment alleged that the conspiracy had five objectives: obstruction of criminal investigations (18 U.S.C. 1510), obstruction of justice (18 U.S.C. 1503), subornation of perjury (18 U.S.C. 1622), embezzlement of union funds (29 U.S.C. 501(c)), and falsification of union records (29 U.S.C. 439 (b) and (c)). The remaining 12 counts charged specific acts of embezzlement and falsification of union records and reports. The conspiracy was alleged to have begun in February 1971 and to have continued

until the date of the indictment, October 27, 1977. This is contrasted with the conspiracy in the first indictment, which began on February 25, 1971, and ended by April 16, 1971, according to that indictment. Petitioner and two other persons, David Wingate and Ashley Burch, Jr., were named as defendants in the first indictment, whereas petitioner and Larkin were the only indicted co-conspirators in the second (Pet. App. A–3; Pet. 5).

Petitioner moved to dismiss the second indictment on double jeopardy grounds. The district court denied the motion and the court of appeals affirmed (Pet. App. A–1 to A–5).

ARGUMENT

We note at the outset that petitioner's double jeopardy argument relates solely to the conspiracy count of the second indictment and not to the 12 additional substantive counts. Petitioner makes no attempt to support his broad conclusion (Pet. 21) that the entire second indictment should be dismissed along with the conspiracy count. In any event, petitioner's argument regarding the conspiracy count is insubstantial.

1. In support of his claim that the two conspiracies were actually one, petitioner relies (Pet. 6–8) on evidence presented to the grand jury that returned the first indictment as well as evidence presented at the ensuing trial indicating that petitioner and his subordinates attempted to cover up petitioner's involvement in the bombings from the very beginning of the

first conspiracy. However, as the court of appeals observed (Pet. App. A–5), "[t]he fact that evidence of the offenses charged in the current indictment was admitted at the earlier trial does not, by itself, implicate the double jeopardy clause, as those offenses were not charged in the first indictment." [1]

After weighing all the evidence presented by petitioner, the district judge who presided over the first trial rejected the claim that there was only one conspiracy, and the court of appeals agreed with that conclusion (Pet. App A–4 to A–5). As the court of appeals noted (*id.* at A–5; footnote omitted):

> Although there is some overlap in the time the conspiracies are charged to have existed, and in the participants in these conspiracies, the overlap is not significant for double jeopardy purposes. Different overt acts are charged, and the underlying objectives are distinct. The second indictment charged a wide-ranging scheme affirmatively and unlawfully to interfere with the processes of justice, rather than a simple continuation of the bombings conspiracy.

This essentially factual determination does not warrant further review. *Berenyi* v. *Immigration Director,* 385 U.S. 630, 635–636 (1967).[2]

[1] This Court has pointed out that an agreement to cover up criminal activities normally may not be implied from an agreement to engage in those activities. *Grunewald* v. *United States*, 353 U.S. 391 (1957).

[2] Petitioner's reliance upon *Braverman* v. *United States*, 317 U.S. 49 (1942), is misplaced. In *Braverman* it was conceded that there was only a single agreement, but the case was submitted to the jury on the erroneous theory that "the conspirators are guilty of as many offenses as the agreement has criminal objects." *Id.* at 53. Here the courts below properly concluded that there were two substantially distinct agreements involving different conspirators and objectives. See, *e.g.*, *United States* v. *Ingman*, 541 F. 2d 1329, 1330 (9th Cir. 1976); *United States* v. *Bommarito*, 524 F. 2d 140, 146 (2d Cir. 1975); *United States* v. *Westover*, 511 F. 2d 1154, 1156 (9th Cir.), cert. denied, 422 U.S. 1009 (1975); *United States* v. *Prince*, 515 F. 2d 564, 567 (5th Cir.), cert. denied, 423 U.S. 1032 (1975). Moreover, petitioner's assertion (Pet. 14) that "the Fifth Circuit clings tenaciously to a restrictive view of the important personal protection against double jeopardy" when single conspiracy claims are presented is incorrect. See *United States* v. *Ruigomez*, 576 F. 2d 1149 (5th Cir. 1978).

2. Petitioner also contends (Pet. 10–16) that there is a conflict among the circuits on the issue of who has the burden of proof when a double jeopardy claim is raised. In *United States* v. *Inmon*, 568 F. 2d 326 (1977), the Third Circuit held that when a defendant makes a non-frivolous showing that an indictment charges the same offense as that for which he was formerly placed in jeopardy, the burden of establishing separate crimes is on the government. The traditional rule, followed by most of the circuits that have addressed the issue, places the burden of proof on the defendant. See *United States* v. *Rumpf,* 576 F. 2d 818, 823 (10th Cir.), cert. denied, No. 78–93 (Oct. 10, 1978); *United States* v. *Westover*, 511 F. 2d 1154, 1156 (9th Cir.), cert. denied, 422 U.S. 1009 (1975); *United States* v. *O'Dell*, 462 F. 2d 224, 226–227 n.2 (6th Cir. 1972); *United States* v. *Wilshire Oil Co.*, 427 F. 2d 969, 976 n.12 (10th Cir.), cert. denied, 400 U.S. 829 (1970); *Rothaus* v. *United States,* 319 F. 2d 528, 529 (5th Cir. 1963). The rule in the Second Circuit is unclear. Compare *United States* v. *Mallah*,

503 F. 2d 971, 985–987 (2d Cir. 1974), cert. denied, 420 U.S. 995 (1975), with *United States* v. *Seijo*, 537 F. 2d 694, 697 (2d Cir. 1976), cert. denied, 429 U.S. 1043 (1977).

As petitioner recognizes (Pet. 14), the court of appeals in this case declined to decide which rule is correct because the district court "explicitly found that defendant had not made * * * a 'non-frivolous showing'" of double jeopardy (Pet. App. A–4). By the same token, there is no need for this Court to resolve the issue here, since petitioner could not prevail even under the Third Circuit's rule. In any event, it is doubtful whether the issue is of sufficient importance to warrant this Court's attention. Most double jeopardy claims raise purely legal questions and therefore do not involve any issue as to burden of proof. See *United States* v. *Venable*, 585 F. 2d 71, 74–75 n.5 (3d Cir. 1978). The only double jeopardy claims that appear to turn largely on the facts are those involving multiple conspiracy charges or collateral estoppel, and the question of who has the burden of proof is rarely outcome-determinative even in that limited category of cases.[3]

3. Little need be said regarding petitioner's claim (Pet. 18–21) that the current indictment should be

[3] Even under the Third Circuit's view, the government need only meet its burden by a preponderance of the evidence. See *United States* v. *Inmon*, *supra*, 568 F. 2d at 332. See also *Lego* v. *Twomey*, 404 U.S. 477 (1972). The court's decision in *Inmon* is the first case that has closely analyzed the burden of proof issue. Therefore, consideration of the issue by the Court at this time would appear to be premature.

dismissed on collateral estoppel grounds. As the court of appeals concluded (Pet. App. A–5), "none of the factual issues involved in the second indictment was necessarily found for the defendant in the first trial, as defendant was convicted on all counts." Since petitioner does not dispute this, there is obviously no basis for a collateral estoppel claim. *Ashe* v. *Swenson*, 397 U.S. 436 (1970).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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